IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2735 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

KARSANJI CHATRAJI HADIYOL

Versus

JASUBEN RAMSINGJI PARMAR

Appearance:

Mr S.K. Zaveri, Sr. Advocate with

MR VIPUL S MODI for Petitioner

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 01/07/96

ORAL JUDGEMENT

1. The petitioner seeks to invoke jurisdiction of this Court under Articles 226 and 227 of Constitution of India in the matter of order dated 11.3.1996 passed by the learned Sessions Judge, Banaskantha, confirming the order dated 03.02.1995 passed by the 2nd Joint Judicial Magistrate First Class, at Palanpur, awarding the

maintenance to respondents Nos. 1 to 4 under the provisions of Section 125 of the Code of Criminal Procedure.

2. The necessary facts giving rise to the present Special Civil Application are that the petitioner took second marriage with respondent No.1 Jashuben on 28.11.1968. Out of their wedlock, respondent No.1 gave birth to one male and two female children. On 19.11.1985, respondent Jashuben filed an application under section 125 of the Cr.P.C. on her behalf as well as on behalf of the minor children viz. Chandansinh, Suryaben and Antarben claiming maintenance. During the pendency of the application, respondent No.1 also filed an application for interim maintenance on 28th May, 1986. This application was allowed by an order dated 30th August 1986. Learned Magistrate directed interim maintenance at the rate of Rs 300/- per month. Main application under section 125 of the Cr.P.C. was finally disposed of by an order dated 3rd May, 1995. Learned Magistrate made award in favour of the wife, viz. Jashuben for a sum of Rs 500/- per month, son Chandansinh - Rs 300/-, daughter Suryaben - Rs 300/- and second daughter Antarben - Rs 250/- per month, in total Rs.1,350/- per month. It was ordered that the amount shall be payable from the date of the application. It was also specified that the son Chandansinh, and daughter Suryaben and Antarben shall be entitled to interim maintenance only upto the date of their attaining majority. It is stated that Chandansinh attained majority on March 05, 1989 and Suryaben on August 16, 1993. Therefore, Chandansinh is entitled to maintenance from the date of the application i.e 19.11.1985 to the date of attaining majority upto 16.08.1989. Similarly, Suryaben is entitled to maintenance from 19.11.1985 to the date of her attaining majority i.e. upto 16.08.1993 and Antarben is entitled to maintenance upto 16.11.1997. There is a finding of fact of both the Courts below on the questions of cruelty and the quantum of maintenance.

3. At the outset, I have asked the learned counsel for the petitioner as to how this writ petition is maintainable under Article 226 and 227 of the Constitution of India. Mr S.K.Zaveri, learned counsel submits that Article 227 of the Constitution of India confers on the High Court the powers of superintendence on inferior courts in the State. The Court of Sessions Judge and the Court of Magistrate are inferior Courts on which High Court exercises powers of superintendence under Article 227 of the Constitution of India. He further submits that such a power has been vested in the

High Court with an object of securing that all such Institutions exercises their powers and discharge their duties properly in accordance with law.. Thus, powers of High Court are unlimited and unfattered.

4. While it is true that High Court is conferred with the power of superintendence over inferior Courts and Tribunals under Article 227 of the Constitution, but in exercise of such powers, High Court does not act as a Court of appeal to review or reappreciate the evidence. The powers of superintendence conferred by Article 226 or 227 of the Constitution of India is to be exercised most sparringly and only in appropriate cases in order to keep the Subordinate Courts in bound of their authority and not for correcting mere errors. In case of M/s India Pipe Fittings Company versus Fakruddin reported in AIR 1978 SC P45, the Apex Court observed that :

> "The limitation of the High Court while exercising the powers under Article 227 of the Constitution of India is well settled. The power under Article 227 is one judicial superintendence and cannot be exercised to upset the conclusions of facts. However, the erroneous it was makeing."

Further, reference may be made to the decision of the Apex Court reported in AIR 1972 SC 117 and AIR 1977 SC 122. This Court has, in M/s Bharat Chemicals v/s Gujarat State Financial Corporation reported in AIR 1996 SC 5 following various decisions of the Apex Court, held that though the existence of alternative remedy is not a complete bar, ordinarily High Court should refuse to exercise such powers if the remedy is otherwise available. The Court also held that in an appropriate cases where the Court finds that subordinate Court or the Tribunal has abused the jurisdiction or has acted in excess of jurisdiction, the Court may in rare cases exercise the supervisory powers under Article 227 of the Constitution of India. In the said case of Bharat Chemicals vs G.S.F.c, the petitioner approached to this Court under Articles 226 and 227 of the Constitition of India against the order of the District Judge inspite of the fact that the remedy was available under section 115 - CPC. Thus, this Court declined to exercise powers under Articles 226 and 227 of the Constitution of India and rejected the petition in limini with exemplary cost of Rs 10,000/-. Inspite of the settled position of law with respect to the scope of Article 226 and 227 of the Constitution of India, there is a growing tendency of approaching the High Court under the writ jurisdiction

bypassing the other remedy or circumbenting the legislative mandate given under a Statute by way of limiting the powers or providing the prohibition clause. Recently in Durgaprasad vs. Navinchandra reported in 1996(3) SCC 300, the Apex Court noticing the fact that in a suit filed for specific performance, a prayer was made for adjournment which was rejected and the Court decided the matter. An application was filed under order-9 rule-13 - CPC with a prayer to set aside the decree. The writ petitioner opposed the said application on the question of its maintainability and prayed the Trial Court to decide the same as preliminary point. This application was rejected by the Court. Against the said order, the writ petitioner approached to the High Court under Article 226 and 227 of the Constitution of India. The High Court - Alhabad rejected the petition. The matter was taken to the Apex Court by way of Special Leave Petition. At the outset, the Court asked the learned counsel as to how the writ petition was maintainable. As usual, the time was sought to study the point. When the matter again came up before the Court, it was contended that there were three remedies available under the CPC viz. appeal under order-43 read with section 104 or a revision under section 115 - CPC or right of appeal under section 96. The Apex Court held that the petitioner had a remedy by way of revision under section 115 - CPC. The writ petitioner, instead of availing the remedy, invoked the jurisdiction of the High Court under Article 226 of the constitution of India. In the opinion of the Apex Court, writ petitioner should not have by passed the remedy available under the CPC. The Court also made it clear that revision against such an order was maintainable and it is a different thing whether the order should be revised or not, which was a matter to be considered by the Revisional Court on merits. It is often contended before this Court that the remedy under section 115 of the CPC is not available for the reason that the jdurisdiction of the High Court is very limited i.e. interference only in case of errors of jurisdiction and as such, the only remedy available is under Article 226 and 227 of the Constitution of India. The decision of the Apex Court in Durgaprasad's case (supra) is the complete answer to such contentions. When the Court says that the remedy is available under section 115 - CPC, the interference of the High Court under Article 226 is not warranted. Whether the order should be revised or not is a matter to be considered by the revisional Court on merits.

It is also observed that the S.C.As. are filed under Article 226 of the Constitution of India in a casual way

as a matter of course, even in matters for interim bail or anticipatory bail. Prayer is made for anticipatory bail by way of petitions under Articles 226 on the ground that with respect to the offence under Scheduled Castes and Scheduled Tribes (Prevention of Attrocities) Act, 1989, on the ground that there is prohibition under section 18. Exercise of powers in such matters is nothing but to circumbent the legislative mandate. To ask the High Court to exercise the powers under Articles 226 and 227 of the Constitution of India in a casual manner and with a view to circumbent the legislative mandate is nothing but the gross abuse of the writ jurisdiction. This aspect has been discussed in greater detail in judgment rendered by this Court in Special Criminal Application No.648 of 1996 (Hari Vallabh Parikh vs. The State of Gujarat) decided on June 17, 1996. It is held in the said case that the petitions under Articles 226 and 227 of the Constitution of India for the grant of anticipatory bail only for the reasons that there is a bar under section 18 of the Act, 1989 is not maintainable. I have also come across the Special Criminal Applications under Article 226 of the Constitution of India, seeking the relief of interim bail in appeal pending before the Court. A Division Bench of this Court had taken a view that a parole cannot be granted during the pendency of the appeal and therefore,d the petitions are filed under Article 226 of the Constitution of India with modified prayer for grant of interim bail completely overlooking the provisions of section 389 of the Cr.P.C. which provides for suspension of the sentence.

5. I am tempted to refer another decision of the Apex Court recently reported in AIR 1996 SC 1209. in the said case in a civil suit against the order of injunction, the writ petitioner by passing the remedy of appeal, approached the High Court of Allhabad under Article 226 of the Constitution of India. The High Court noticed this aspect in the following words :

> "Ofcourse, he could have availed the jurisdiction of the District Judge, who is an authority to hear appeal as well as revision. But somehow or the other, he has been advised to approach this Court."

The Apex Court disapproved the approach of the High Court and held that the High Court not only fell into patent error but also exceeded its jurisdiction under Article 226 of the Constitution of India. The Court observed that the High Court will not permit the extra ordinary

jurisdiction to be converted into Civil Court under the ordinary law. Mr Kuldeepsingh, J., thus said :-

> "We are of the view that the High Court not only fell into patent error but also exceeded its jurisdiction under Article 226 of the Constitution is not confined to issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extraordinary jurisdiction to be converted into a civil Court under the ordinary law. When a suit is pending between the two parties the interim and miscellaneous orders passed by the trial Court - against which the remedy of appeal or revision is available - cannot be challenged by way of a writ petition under Article 226 of the Constitution of India. Where the civil Court has the jurisdiction to try a suit, the High Court cannot convert itself into an appellate or revisional Court and interfere with the interim/ miscellaneous orders of the Civil Court. The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum."

The Apex Court allowed the Special Leave Petition and while setting aside the judgment of the High Court, dismissed the writ petition with an exemplary costs of Rs.20,000/-.

6. It is contended by MrZaveri, learned counsel for the petitioner that the impugned order calls for interference by this Court in exercise of powers under Article 226 of the Constitution of India, firstly, for the reason that the proceedings under section 125 of the Cr.P.C. are civil proceedings and as such, the bar contained under sub-section (3) of section 397 does not come in the way of approaching to this Court and secondly, the order of the learned Magistrate is wholly without jurisdiction inasmuch as that in the facts of the case, the effect of the order of maintenance from the date of the application amounts to increase of maintenance retrospectively. Taking the first ground, learned counsel has referred to a decision of the Apex Court reported in AIR 1986 SC 984 in case of Smt. Savitri vs. Govindbhai. He has invited my attention to the para-4 of the judgment wherein the Court has observed that the jurisdiction of the Magistrate under Chapter IX of the Code is not strictly of the criminal jurisdiction. He has invited my attention to the quoted portion in

para-5 which reads as follows :

"Thus, section-488 is not intended to provide for a full and final determination of the status and personal rights of the parties. The jurisdiction conferred by section on the Magistrate is more in the nature of a preventive rather than a remedial jurisdiction. It is certainly not punitive."

7. I have carefully read the judgment of the Apex Court. In the said case, the question for consideration was whether a magistrate before whom application under section 125 of the Cr.P.C. is made, can make an interim order directing the person against whom the application is made to pay reasonable maintenance to the applicant concerned pending the disposal of the application. Tracing the object of the provision, Court observed that Chapter IX contains summery remedy to provide quick remedy to protect the applicant against starvation and tide over the immediate difficulties. Thus, the Court construe the provision in Chapter IX as conferring a implied power on Magistrate to direct interim maintenance in order to achieve the object of the said legislation. While examining the scheme under Chapter IX, the Court observed that jurisdiction of the Magistrate under Chapter IX is not strictly of a criminal jurisdiction. It is true that the provisions of the chapter are not in the nature of penal provisions. There is no accused, no trial. The provisions are intended to enforce certain rights. It is for enforcement of a duty a default in which may lead to vagrancy and hence, the proceedings may be described of quasi criminal nature or of civil nature or even civil proceedings, but still the fact remains that proceedings are governed by the Code of Criminal Procedure. The legislature in its wisdom has provided the remedy to enforce the right of maintenance to wives, children and the parents through the process of Criminal Procedure Code, obviously to provide summary and speedy justice in such matters, in the interest of justice. The Code provides rigirous provisions to ensure prompt execution of the order which includes arrest warrant and sentence on each breach. Therefore, it is erroneous to contend that the proceedings under Chapter IX are civil proceedings and as such, remedy against the order is available even outside the Code of Criminal Procedure and the bar of second revision under section 397(3) does not come in the way for approaching this Court under Article 226 and 227 of the Constitution of India.

7. Learned counsel has also referred to a decision reported in AIR 1965 SC 181, AIR 1984 SC 302, 1969 (2)

SCC 782, Law Reporter Appeal Cases 1985 page 374 and AIR 1993 SC 1362. Out of the said authorities, I shall deal with only the last authority i.e. AIR 1993 SC 1361, as all the other authorities does not advance the case of the petitioner. In Dharampal vs. Ramlal reported in AIR 1993 SC 1361, in a proceedings under section 145 of the Cr.P.C., in view of the bar contained under section 397(3), the High Court entertained the petition under section 482 and interfered with the order of the Revisional Court. The Apex Court observed as this :

> "It is now well settled that the inherrent powers under section 482 of the Code cannot be utilised for exercising the powers which expressly bar the Code and the High Court has clearly erred in entertaining the second revision at the instance of first respondent. On this ground itself, the impugned order of the High Court can be set aside."

The Apex Court, though observed that the impugned order can be set aside only on the ground that the petition under section 482 of the Cr.P.C. was wrongly entertained, still proceeded to examine the matter on merits and found that there was no illegality in the order passed by the learned Magistrate and upheld by the Revisional Court. In view of this, even on merits, the order of the High Court was set aside and the orders of both the Courts below were restored. The contentions of the learned counsel is that the against the order of the revisional Court, the petitioner cannot have a remedy under the Code of Criminal Procedure by way of petition under section 482 of the Cr.P.C. and therefore, the only remedy is under Article 226 and 227 of the Constitution of India. We again come to the square one. It is erroneous to think that if there is prohibition under the statute, the remedy is only under Article 226 of the Constitution of India and the party straightway without any limitation can walk in under the label of Article 226 or 227 of the Constitution of India, as if the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India is to defy the legislative mandate. The extra ordinary remedy can be invoked only in the exceptional circumstances where there is a case of gross abuse or the order is wholly without jurisdiction. The Courts have repeatedly said that the powers of the High Court should be exercised with great circumspection only sparingly in rare cases. Similarly, the powers under section 482 can also be not exercised only on the ground that the second revision is prohibitted under the provisions of section 397(3). The Apex Court has said

that such a petition under section 482 would be nothing but a second revision. The legislature has provided the prohibition of second revision with a view to shorten the hierarchy of foroums in Court litigations and to attach the finality at some stage. The experience in Dharampal's case (supra) clearly confirms the wisdom of the legislature in providing the bar of second revision under sub-clause - 3 of section 397 of the Cr.P.C. In the said case, interference by High Court under section 482 of the Cr.P.C., inspite of the bar of second revision only prolonged the litigation for no use, as ultimately, the order of the learned Magistrate and of the learned Sessions Judge in first revision were found to be correct on merit. Thus, I find no merit in the first contention and the same is accordingly rejected.

8. The second contention is that the order of the learned Magistrate is without jurisdiction inasmuch as the order for maintenance under section 125 of the Cr.P.C. can be awarded only once. An alteration in the order can be made under certain set of the circumstances provided under section 127 of the Cr.P.C., as such, the maintenance awarded by the final impugned order so far as it extends to payment w.e.f. the date of the application, amounts to increase of maintenance retrospectively and as such, to that extend, the impugned order is without jurisdiction. The argument may be genious, but it is without merits. The interim maintenance is awarded as interim measure to protect the applicant from starvation and to tide over the immediate difficulties. Under sub-section (2) of section 125 of the Cr.P.C., there is a discretion vested with the Magistrate to grant the maintenance from the date of the order or from the date of the application. A final order of maintenance does not amount to revising the interim maintenance, and thus, order of maintenance under the final order from the date of application cannot be said to be an increase with retrospective effect. In view of this, even on the second ground, no interference is called for by this Court under Article 226 or 227 of the Constitution of India.

9. In the last, it is submitted by the learned counsel for the petitioner that it is not possible kfor the petitioner to immediately pay the entire amount of maintenance due. Once I have found that the petition is not maintainable under Article 226 or 227 of the Constitution of India, it will not be open for this Court to give any directions with respect to the payment of the amount due in instalments, as for such orders, some sort

of summary inquiry is reqwuired as to whether the petitioner has sufficient means to pay the entire amount immediately or not. The petitioner ought to have made such prayer before the Court of Magistrate who initially passed the order of maintenance or before the revisional Court. The petitioner can still make such prayer, if so advised at the stage of proceedings under sub-section (3) of section 125 of the Code of Criminal Procedure. Section 125 of the Cr.P.C. provides that if any person so ordered fails without sufficient cause to comply with the order, the Magistrate may for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying the fine and may sentence such person. The phraseography used in sub-section (3) of section 125 is not only default simplicitor, but coupled with sufficient causes. Thus, before the issuance of warrant on application by the wives or children for non-compliance ofthe order, the Magistrate must give an opportunity to the affected party to show that there was sufficient cause for non-compliance of the order. Thus, at the stage of satisfaction whether there was sufficient cause for non-payment of arrears of maintenance as ordered under sub-section (1) or (2) of section 125, the petitioner will have an opportunity to satisfy the Court that he committed default in payment of the arrears on account of sufficient cause. For this purpose, the learned Magistrate may embark upon summary inquiry, and if he is so satisfied, order may be made to make payment of amount due in reasonable instalments fixed by the Court.

10. In view of the aforesaid, this Special Civil Application is rejected in limini, as not maintainable.

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